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LATHAM & WATKINS LLP

December 13, 2016

VIA EMAIL & U.S. MAIL

Ms. Alice Yeh
Remedial Project Manager
U.S. Environmental Protection Agency, Region 2
290 Broadway, 19th Floor
New York, NY 10007

Re: Estate of Alexander DiLorenzo III Request for Early Settlement Lower Passaic Study Area Operable Unit of the Diamond Alkali Superfund Site

Dear Ms. Yeh:

This letter is submitted on behalf of the Estate of Alexander DiLorenzo III (the "Estate"), a limited partner in DiLorenzo Properties Company ("DPC"). DPC has been identified by the United States Environmental Protection Agency ("USEPA") as a potentially responsible party ("PRP") for the Lower Passaic River Study Area Operable Unit of the Diamond Alkali Superfund Site (the "LPRSA"). Please add this letter to the administrative record for the LPRSA.

On September 24, 2004, USEPA issued a General Notice Letter to DPC under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). DPC, despite believing it had no liability, joined the LPRSA Cooperating Parties Group ("CPG"). On January 24, 2016, Alexander DiLorenzo III passed away; the Estate is being administered by his widow, Feng Wei Peng-DiLorenzo, in New York. The purpose of this letter is to document the facts concerning DPC's alleged connection to the LPRSA and to provide the basis for an early buyout settlement that will enable the Estate to promptly wind up its affairs and close.

Under New York law, the Estate must account for potential liabilities of Alexander DiLorenzo III – arguably including the Estate's limited partnership interest in DPC – in order to promptly wind up and close. *Witco Corp. v. Beekhuis*, 38 F.3d 682, 688-89 (3d Cir. 1994) ("[A] state's interest in the prompt settlement of its citizens' estates is particularly strong."); *id.* at 689 ("Under traditional probate law, … a decedent's personal representative pays the decedent's debts …"). CERCLA should not be applied to "create pandemonium in the descent and distribution of decedents' estates." *Id.* at 690. In light of CERCLA's desire to avoid causing protracted probate proceedings, the reality that it will be decades before all response actions on

the LPRSA are decided and implemented, and the fact that any assumed discharges from the Property would be, at most, both *de micromis* and *de minimis*, the Estate contends that an early buyout settlement for DPC now is both appropriate and in the public interest.

The letter contains the following sections: **Part I** provides an executive summary; **Part II** summarizes the facts concerning DPC's alleged nexus to the LPRSA; **Part III** discusses whether those facts support the conclusion that DPC is liable for LPRSA response costs under CERCLA; **Part IV** describes DPC's expenditures and cooperation to date concerning the LPRSA; and **Part V** explains why DPC is eligible for an early buyout settlement.

I. EXECUTIVE SUMMARY

DPC's only connection to the LPRSA is that, from 1985 to 1992, it was the direct or indirect passive owner of property located at 44 Passaic Avenue (also known as 25 Belgrove Drive) in Kearny, New Jersey (the "Property") that was operated – and contaminated by – American Modern Metals Corporation ("AMM"). DPC had no involvement in operations at the Property, the hazardous substances used at the Property, or any discharges of hazardous substances at the Property. In short, there is no evidence to support a finding that DPC is liable under CERCLA for LPRSA response costs. Rather, the facts concerning DPC show the following:

- DPC indirectly or directly held an ownership interest in the Property from 1985 until 1992. During this 7-year time period (and for decades prior), the Property was leased to AMM and others. DPC had ***zero*** involvement with operations at the Property.

- AMM operated the Property from at least 1959 until 2004 to manufacture aluminum baseball and softball bats. AMM's operations used limited hazardous substances (aluminum alloys, petroleum-based and chlorinated solvents, and petroleum products) and recycled any hazardous waste in operations or disposed of it offsite. Notably, AMM's process operations were a "closed loop" system, meaning that AMM did not discharge process wastewater to the Passaic Valley Sewer Commissioners ("PVSC") system.

- DPC cannot be liable under CERCLA as the former owner or operator at the time of disposal because the relevant CERCLA facility – as defined by USEPA – is the LPRSA, not upland properties. As DPC never owned or operated the Passaic River, it cannot be liable as a former owner or operator. Nor can DPC be liable as an "arranger": it had no involvement with hazardous substances at the Property, and there is not a scintilla of evidence to even suggest that DPC intended for hazardous substances to be disposed of in the LPRSA.

- Even if DPC could somehow be considered an "arranger" of AMM's discharges of hazardous substances, AMM nonetheless was not the source of and did not use or generate any of the contaminants of concern that are necessitating remedial action in the LPRSA, namely (i) dioxins/furans, including 2,3,7,8-tetrachlorodibenzo-p-dioxin ("2,3,7,8-TCDD"), (ii) polychlorinated biphenyls ("PCBs"), (iii) dichlorodiphenyl-trichloroethane and its breakdown products ("DDx"); and (iv) mercury (collectively, the "Remedial Action COCs"). Accordingly, even assuming DPC could have arranger liability for AMM's discharges (and it does not), those discharges are not and will not cause the incurrence of response costs in the LPRSA.

At bottom, the facts simply do not show that DPC is responsible for LPRSA response costs because, first and foremost, DPC had ***no involvement*** with any hazardous substances used at the Property. In other words, DPC's limited, passive ownership of the Property is insufficient to support a finding of CERCLA liability for the LPRSA. In light of DPC's lack of liability, the Estate requests that USEPA offer DPC an early buyout settlement, which will enable the Estate to address DPC's potential Passaic River liabilities and wind up in a prompt manner. Without such a settlement, the administration of the Estate may languish for years. It is both inconsistent with CERCLA's intent and fundamentally unfair to have the LPRSA hold up resolution of the Estate. Consequently, the Estate urges USEPA to include DPC in its upcoming early buyout settlement opportunity.

II. THE FACTS CONCERNING THE PROPERTY

A. Ownership History

From the early 1900s until 1959, the Property was owned by Linden Thread Company, which operated a linen production plant. [1995 Remedial Investigation Report/Remedial Action Work Plan § 1.3 ("1995 RIR").] By September 2, 1959, the Property had been sold to York Associates, Inc. ("York"), a corporation. [Lease Agreement between York and Elite Industrial Park, Inc. (Sept. 2, 1959).] On September 16, 1963, York transferred the Property to Goldex Holding Company ("GHC"), a partnership comprised of three individuals, including Alexander DiLorenzo, Jr., the father of Alexander DiLorenzo, III, who passed away on September 5, 1975. [Indenture between York and S. Goldman, I. Goldman, and A. DiLorenzo, Jr. (Sept. 16, 1963).] In December 1985, DPC was formed to manage the remaining assets of the estate of Alexander DiLorenzo, Jr. Three years later, on November 22, 1988, GHC transferred ownership of the Property to DPC. [Administrative Consent Order with New Jersey Department of Environmental Protection at 2 (Nov. 1988) (listing DPC as the "buyer" of the Site).]

DPC owned the Property until June 25, 1992, at which time it conveyed title to Kearny Industrial Associates ("KIA"), an affiliate of AMM. [Agreement of Sale between DPC and KIA at 2 (June 25, 1992).] KIA owned the Property until February 7, 2001 when it transferred the western portion of the Property (the parcel west of Passaic Avenue and closest to the Passaic River) to S&A Realty Corp. ("S&A"). [Purchase Agreement between KIA and S&A at 1 (Feb. 7, 2001).] In 2006, KIA started to become dispossessed of its ownership in the remainder of the

Property through a tax foreclosure proceeding. In 2011, the foreclosure action was completed and Quality Tax Holdings, LLC ("QTH") became the owner of the eastern portion of the Property. [*Quality Tax Holdings, LLC v. Kearny Indus. Assoc. et al.*, No. HUD-F-1519-06 (Nov. 27, 2006).] In June 2011, QTH transferred ownership of the eastern parcel to Kearny Aldo, LLC, the current owner of that lot.[1] [Berkshire Abstract & Title Agency Report (June 6, 2013).]

B. Operational History

DPC never operated the Property – hardly a surprising fact given that DPC was formed in 1985 to manage the assets of Alexander DiLorenzo, Jr.'s estate. Instead, the Property was operated by two entities: (i) Michael Palin (through his affiliated entities), and (ii) AMM.

1. *Michael Palin*

On September 2, 1959 – 26 years before DPC was even created – York leased the Property to Elite Industrial Park, Inc. ("Elite"), an entity controlled by Michael Palin. [Lease Agreement between York and Elite Industrial Park, Inc. (Sept. 2, 1959).] The term of the lease was fifty (50) years and two (2) months (*i.e.*, until October 31, 2009). [*Id.*] As tenant, Palin decided to sublease the Property to various industrial entities, including, most notably, Airlite Aluminum Corporation ("Airlite"), which became AMM.

When York transferred the Property to GHC on September 16, 1963, Elite continued as master tenant. On December 17, 1974, Elite assigned its leasehold interest to E&P Enterprises Company ("E&P"), another Palin entity. [Assignment of Lease between E&P and Airlite Aluminum Corp. at 1 (Feb. 15, 1980).] On February 15, 1980, E&P transferred its leasehold interest to Airlite. [*Id.*] Airlite was purchased by AMM in late 1980.

2. *AMM*

From approximately 1963 until 2004, AMM manufactured aluminum products, primarily baseball and softball bats, at the Property. AMM used few raw materials in its operations: (i) aluminum alloys, (ii) chlorinated solvents, primarily trichloroethylene ("TCE"), (iii) petroleum-based solvents (mineral spirits, Cyclo-Sol 53, toluene, xylenes), (iv) paints and other solvents (methyl ethyl ketone, methanol, n-butyl acetate, lacquer, lacquer thinner), (v) methylene diphenyl isocyanate, (vi) polyurethane foam and (vii) petroleum products (kerosene, lubricating oil, cutting oils, gasoline, naphthenic distillate). [1995 RIR § 4.2.3; 1999 Remedial Investigation Report and Remedial Investigation Workplan § 3.2.3; AMM Letter to NJDEP (June 19, 1986); NJDEP Inspection Form (Mar. 6, 1984); NJDEP Enforcement Referral (Mar. 7, 1984); 2011 Preliminary Assessment/Phase I Environmental Site Assessment Report; Results of Phase II Sampling Plan (Aug. 1991).] AMM's process involved melting aluminum billets, which were

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[1] York, QTH, and Kearny Aldo, all corporations or limited liability companies, were owned in whole or in part by Alexander DiLorenzo Jr. or Alexander DiLorenzo III. CERCLA, of course, does not disregard the bedrock principle that, absent evidence sufficient to pierce the corporate veil (which does not exist here), holders of ownership interests in a corporation or limited liability company are not responsible for the liabilities of those entities. *See United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998).

then placed in molds to create a "blank" bat. [1995 RIR § 1.3.] The blanks were then finished by painting, the insertion of foam, and the attachment of any accessories.[2] [*Id.*]

Any waste generated by AMM's operations was either recycled or sent off-site for disposal. AMM operated a "closed loop system" that reused process wastewater as cooling water (meaning AMM did not discharge process wastewater to the PVSC system). [NJDEP Inspection Report (Aug. 16, 1998).] In addition, all waste oils and lubricants were processed onsite using a distillation system, and the recycled fluids were reused in operations. For instance, recycled oil was used to coat finished aluminum products with a thin film of oil to prevent oxidation. [NJDEP Memorandum (Dec. 29, 1986).] Likewise, used solvents were distilled, filtered, and reused in operations. [NJDEP Inspection Report (Mar. 6, 1984).] Finally, still bottoms generated by the manufacturing process, which would have contained metals, were sold to scrap metal businesses. [*Id.*] In sum, AMM's operations were designed to minimize waste generation and discharge of that waste to the environment.

C. Contamination at the Property

Environmental investigations conducted at the Property under the New Jersey Industrial Site Recovery Act ("ISRA") have identified contamination consistent with AMM's operations. Specifically, these investigations have identified petroleum hydrocarbon and chlorinated solvent impacts (TCE and its degradation products) in soils, metals – but not mercury – in soils (both attributable to Property operations and historic fill), PAHs in soil (attributable to historic fill), and chlorinated solvent and non-mercury metal impacts in groundwater.[3] [2001 Remedial Investigation Report at Table 1.]

III. DPC IS NOT LIABLE FOR LPRSA RESPONSE COSTS

In order to establish CERCLA liability, USEPA must prove that (i) "the defendant falls within one of the four categories of 'responsible parties'" under Section 107(a); (ii) "hazardous substances are disposed at a 'facility'"; (iii) "there is a 'release' or 'threatened release' of hazardous substances from the facility into the environment"; and (iv) "the release causes the incurrence of 'response costs.'" *Outlet City, Inc. v. West Chem. Prods., Inc.*, 60 Fed. Appx. 922, 926 (3d Cir. 2003) (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252,266 (3d Cir. 1992)). As explained below, DPC is not liable for LPRSA response costs.

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2 These finishing operations were often undertaken by various AMM affiliates or unincorporated "trade names" at the Property: Marshall Clark Manufacturing, American National Supply and Machinery Co., Kearny Industrial Complex, SBC Sports Company, FSB Sports Company, and American Extrusion Tool and Die Co. [Stipulation of Settlement (June 25, 1992), at 2-3.] These trade names, however, had "no legal existence" apart from AMM and were "merely trade names for the marketing of products[.]" [*Id.*]

3 A single detection of PCBs previously was identified on the Property near the former location of a transformer. This area was excavated in December 1992, after which no PCB impacts were detected and for which NJDEP provided a no further action determination. There is no evidence that this isolated PCB detection was related to AMM's operations.

A. DPC is Not a Potentially Responsible Party

There are four categories of potentially responsible parties ("PRPs") under CERCLA: (i) current owners and operators of the relevant CERCLA "facility"; (ii) former owners or operators of the relevant CERCLA facility at the time a hazardous substance was disposed; (iii) persons who arranged for the disposal or treatment of a hazardous substance at the relevant CERCLA facility; and (iv) persons who transported a hazardous substance to the relevant CERCLA facility. *See, e.g., Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599, 608-09 (2009); *Litgo N.J., Inc. v. N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 379 (3d Cir. 2013). Only two of these potential PRP categories – former owner or operator at the time of disposal and arranger – even arguably could apply to DPC, a passive landowner. Black-letter law, however, demonstrates that DPC is not either type of PRP.

1. *Former Owner at the Time of Disposal*

A former owner can be responsible for response costs if it owned the relevant CERCLA facility at the time hazardous substances were disposed. 42 U.S.C. § 9607(a)(2) ("any person who at the time of disposal of any hazardous substance owned or operated *any facility at which* such hazardous substances were disposed of") (emphasis added). Although DPC indirectly or directly owned the Property from 1985 until 1992, the Property is not part of the relevant CERCLA facility. Instead, USEPA has defined the "facility" as "the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay." [USEPA, Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study ¶ 24 (May 10, 2007) ("The Lower Passaic River Study Area is a 'facility' as defined in Section 101(9) of CERCLA"); *id.* ¶ 14(*l*) (defining LPRSA).] Because DPC never owned the LPRSA, it cannot be liable as a former owner at the time hazardous substances were disposed of in the LPRSA (putting aside for the moment the lack of evidence that any hazardous substances were discharged from the Property into the LPRSA).

2. *Former Operator at the Time of Disposal*

As with former owner liability, DPC is not the former operator of the LPRSA at the time of disposal – because DPC never operated on the LPRSA. In addition, even if the relevant CERCLA facility included the Property (which, according to USEPA, it does not), DPC still is not the former operator of the Property at the time of disposal. "The determination of who operates a facility … is a functional one, which does not depend on ownership." *Virginia St. Fidelco, LLC v. Orbis Prods. Corp.*, No. 11-2057, 2016 U.S. Dist. LEXIS 102641, at *10 (D.N.J. Aug. 3, 2016). A CERCLA "operator" must "manage, direct, or conduct operations specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67.

DPC, as a passive owner of the Property, had no involvement with Property operations at all, let alone the level of involvement sufficient to impose former operator liability. *See, e.g., N.J. Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., Inc.*, 800 F. Supp. 1210, 1219 (D.N.J. 1992) (operator liability imposed "where [an] individual shows a high degree of personal

involvement in the operation and decision-making process of the business."); *see also United States v. Tarrant*, No. 03-3899, 2007 U.S. Dist. LEXIS 30331, at * (D.N.J. Apr. 25, 2007) ("Court's inquiry should not focus on whether the alleged operator 'had sufficient control to direct the hazardous substance disposal activities or prevent the damage caused,' but should instead seek to determine whether that individual 'participated in the hazardous substance disposal activities.'") (internal citations omitted). CERCLA simply does not "draw in persons or entities who" – like DPC – "have no connection to hazardous waste disposal" at a given facility. *Lentz v. Mason*, 961 F. Supp. 709, 716 (D.N.J. 1997). In sum, DPC cannot be liable for LPRSA response costs as a former owner or operator at the time of disposal.

3. *Arranger*

An entity is an arranger if it arranged for disposal of a hazardous substance at a given CERCLA facility. 42 U.S.C. § 9607(a)(3). The United States Supreme Court has explained that arranger liability requires evidence that DPC took "intentional steps to dispose of a hazardous substance." *Burlington Northern and Santa Fe Ry. Co.*, 556 U.S. 599, 611 (2009). Said differently, DPC actually must have ***intended*** to dispose of hazardous substances in the LPRSA. *Id.* at 612 ("In order to qualify as an arranger, Shell must have entered into the sale of D-D *with the intention* that at least a portion of the product be disposed of") (emphasis added); *id.* at 612-13 ("the evidence does not support an inference that Shell *intended* such spills to occur") (emphasis added); *see also United States v. Cornell-Dubilier Elecs., Inc.*, No. 12-5407, 2014 U.S. Dist. LEXIS 140654, at *24 (D.N.J. Oct. 3, 2014) ("Nothing in the record indicates that the Government took *intentional steps to dispose of any pollutants at the facility*. In light of this lack of evidence, the Court concludes that the Settling Parties had a rational basis for finding the Government not liable as a prior arranger").

At bottom, arranger liability is designed to "fairly capture individuals responsible for contamination." *Virginia St. Fidelco*, 2016 U.S. Dist. LEXIS 102641, at *12. DPC had no involvement with hazardous substances at the Property, and there is no evidence that DPC intended for hazardous substances to be discharged from the Property into the LPRSA. These facts preclude a finding that DPC is an arranger under CERCLA. *See, e.g.*, *Lentz*, 961 F. Supp. at 716-17 (to hold defendant who did not even know about hazardous substance disposal liable "would expand 'arranger' liability to absurd proportions"); *Bonnieview Homeowners Ass'n v. Woodmont Builders, LLC*, 655 F. Supp. 2d 473, 498 (D.N.J. 2009) ("There is no evidence that the Individual Plaintiffs took steps to intentionally dispose of a hazardous substance at the Residential Lots, so they cannot be liable under § 107(a)(3)"). Simply put, ***ownership of the Property alone is not sufficient*** for arranger liability. *Morton Int'l, Inc. v. A.E. Staley Mfg.*, 343 F.3d 669, 677 (3d Cir. 2003) ("the most important factors in determining 'arranger liability' are: (1) ownership or possession; and (2) knowledge; or (3) control. Ownership or possession *of the hazardous substance must be demonstrated*, but this factor alone will not suffice to establish liability.") (emphasis added).

B. Even Assuming DPC Could be Responsible for Any Alleged AMM Discharges to the LPRSA, Those Discharges Have Not and Will Not Cause the Incurrence of Response Costs

As a threshold matter, there is no evidence that any AMM discharges reached the LPRSA, especially given that AMM did not discharge any process wastewater to the PVSC system.[4] Nevertheless, even assuming that AMM discharges *both* occurred *and* reached the LPRSA, and that DPC could somehow be liable for such discharges (which it cannot because it is not a PRP), any AMM discharges have not and will not cause the incurrence of LPRSA response costs.

In order to be liable under CERCLA, the releases of hazardous substances at issue must cause the incurrence of response costs. *N.J. Turnpike Auth. v. PPG Indus.*, 197 F.3d 96, 104 (3d Cir. 1999) ("In order to prove [arranger liability], our prior case law is clear that such a plaintiff 'must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs.'"); *Alcan Aluminum*, 964 F.2d at 271 (if a party "can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response costs"); *see also Hatco Corp. v. W.R. Grace & Co.*, 849 F. Supp. 931, 979 (D.N.J. 1994) (determining that plaintiff was not responsible for any response costs because, even though it discharged hazardous substances, the PCBs discharged by the defendant "will drive the cost of the clean-up").

Any assumed AMM discharges to the LPRSA would not cause the incurrence of response costs. The hazardous substances driving the risk, and therefore response costs, at the LPRSA are dioxins/furans, and to a lesser extent, PCBs. [FFS ROD at 29 ("The primary contributors to the excess risk are dioxins/furans (70 percent for fish consumption and 82 percent for crab consumption), dioxin-like PCBs (11 percent for fish consumption and 12 percent for crab consumption), and non-dioxin-like PCBs (16 percent for fish consumption and 5 percent for crab consumption). *The other COPCs contributed a combined 3 percent to the excess cancer risk.*") (emphasis added); *id.* at 30 ("Dioxins/furans and PCBs combined contribute more than approximately 98 percent of the excess hazard, while the remaining excess hazard is associated with methyl mercury for all receptors for ingestion of both fish and crab.").] AMM did not use, generate, or discharge dioxins/furans or PCBs or the other two Remedial Action COCs, DDx and mercury. [FFS ROD at 14-16.] Rather, AMM's operations only involved limited hazardous substances: (i) aluminum alloys, (ii) chlorinated solvents, (iii) petroleum-based solvents, (iv) paints and other solvents, (v) methylene diphenyl isocyanate, (vi) polyurethane foam and (vii) petroleum products . Because AMM's discharges (even if assumed to have occurred) would not cause the incurrence of LPRSA response costs, there is no theory of liability under which DPC could, in turn, be held responsible for LPRSA response costs.

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[4] A report by Roux Associates Inc., included with the December 2016 submission by the Goldman/DiLorenzo Related Companies for the LPRSA, contains additional detail on the lack of evidence that hazardous substances were discharged from the Property into the LPRSA.

IV. DPC HAS ALREADY PAID FOR SUBSTANTIAL LPRSA RESPONSE COSTS

Despite its lack of liability, as a result of its receipt of the notice letter and its desire to be a good corporate citizen, DPC has voluntarily participated in the RI/FS and RM 10.9 removal action in the LPRSA, and been a member of the CPG since 2007 – at very substantial cost. As USEPA knows, DPC (on behalf of itself and the Goldman/Goldman/DiLorenzo partnership (*i.e.*, GHC)), is a "Settling Funding Party" under the RI/FS AOC – a designation that speaks volumes as to DPC's lack of connection to the LPRSA. [RI/FS AOC at Appendix A-2.]

In addition, in 2012, USEPA requested that the CPG perform a removal action of a sediment deposit near RM 10.9 with elevated concentrations of dioxins and PCBs. DPC, with the other CPG members, agreed to perform the RM 10.9 removal action, which involved, in part, the dredging of approximately 16,000 cubic yards of sediment. [USEPA, Administrative Settlement Agreement and Order on Consent for Removal Action (June 18, 2012).] DPC has paid its share in connection with the RM 10.9 removal action to date.

V. AN EARLY BUYOUT SETTLEMENT FOR DPC IS PROPER UNDER CERCLA AND NEEDED TO PROMPTLY CLOSE THE ESTATE

An early buyout settlement for DPC is warranted here for two reasons: (i) there is no credible evidence upon which to base DPC's alleged liability for LPRSA response costs, and (ii) CERCLA requires that USEPA "facilitate [settlement] agreements … that are in the public interest[.]" 42 U.S.C. § 9622(a); *see also* 42 U.S.C. § 9622(g)(1) ("Whenever practicable and in the public interest," USEPA shall "as promptly as possible reach a final settlement with a potentially responsible party" who is *de minimis*). For the reasons discussed below, allowing DPC to resolve its potential LPRSA liability and avoid further unnecessary transaction costs, and allowing the Estate to promptly close, are both in the public interest.

A. AMM's Discharges Were Nonexistent

Here, there is no evidence that AMM discharged anything to the LPRSA; rather, the facts indicate that AMM operated a "closed loop" process that would have recycled and reused any hazardous substances. Even assuming discharges occurred (and there is no evidence they did), it is difficult to see how those discharges would be anything other than minimal in amount compared to the known direct and indirect discharges of hazardous substances by other parties. Because there is no evidence of discharges to the LPRSA from the Property, DPC is an ideal early buyout settlement candidate.

B. AMM's Discharges, Even if Assumed, Would Not Cause the Incurrence of Response Costs

There can be no dispute that dioxin, and to a lesser extent PCBs, are driving toxicity at the LPRSA. [FFS ROD at 29 ("The primary contributors to the excess risk are dioxins/furans (70 percent for fish consumption and 82 percent for crab consumption), dioxin-like PCBs (11 percent for fish consumption and 12 percent for crab consumption), and non-dioxin-like PCBs (16 percent for fish consumption and 5 percent for crab consumption). *The other COPCs*

contributed a combined 3 percent to the excess cancer risk.") (emphasis added); *id.* at 30 ("Dioxins/furans and PCBs combined contribute more than approximately 98 percent of the excess hazard, while the remaining excess hazard is associated with methyl mercury for all receptors for ingestion of both fish and crab.").]

AMM's operations, and therefore any assumed AMM discharges to the LPRSA, are not associated with any dioxin/furans or PCBs – or any of the other Remedial Action COCs identified in the FFS ROD. That lack of connection is more than sufficient to establish that AMM's hazardous substances (even if any reached the LPRSA) present minimal toxicity when compared to other hazardous substances in the LPRSA and would not cause the incurrence of any response costs. Because any (hypothetical) discharges from the Property would be minimal in toxicity and not affect response costs, USEPA should offer DPC an early buyout settlement.

C. Offering DPC an Early Buyout Settlement to Enable the Estate to Wind Up and Close Is in the Public Interest

Offering an early buyout settlement to DPC (a party that is neither a former owner nor operator, nor an arranger for the disposal of hazardous substances in the LPRSA) has multiple benefits, as recognized in USEPA's own guidance: (i) reducing transaction costs, (ii) reimbursing USEPA's past costs, (iii) providing funds for future response actions at the LPRSA, and (iv) providing an incentive for other parties to settle their potential liability. [USEPA, "Standardizing the *De Minimis* Premium" at 1 (July 7, 1995); USEPA, "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) *De Minimis* Waste Contributor Settlements" at 2 (Dec. 20, 1989)]. The incentives for offering an early buyout settlement are even stronger where, as here, the failure to provide a buyout settlement offer has the likely consequence of forcing the Estate to continue indefinitely. CERCLA is not supposed to cause this result.

VI. CONCLUSION

Notwithstanding the fact that DPC is not liable for any LPRSA response costs, DPC has cooperated in good faith with USEPA and already paid hundreds of thousands of dollars in response costs for the RI/FS AOC and RM 10.9 removal action. An early buyout settlement for DPC is needed now to allow the Estate to be fully administered and closed, and the Estate is willing to discuss and negotiate such a settlement with USEPA at the earliest opportunity.

Sincerely,

Gary P. Gengel
of LATHAM & WATKINS LLP

cc: Sarah Flanagan, Esq. (USEPA Region 2) (via email)
Juan Fajardo, Esq. (USEPA Region 2) (via email)
Ms. Feng Wei Peng-DiLorenzo (Administrator for the Estate of Alexander DiLorenzo III) (via email)
Kegan Brown, Esq. (Latham & Watkins LLP) (via email)